

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1133

To be argued by
James R. McGowan

No. 77-1133

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

LOUIS DI MAIO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF FOR THE DEFENDANT-APPELLANT

JAMES P. MCGOWAN
c/o SALTER, MCGOWAN, ARCARO & SWARTZ
INCORPORATED

300 INDUSTRIAL BANK BUILDING
PROVIDENCE, RI 02903
(401) 274-0300

AMEDEO C. MEROLLA
c/o TEMPKIN, MEROLLA & ZURER
40 WESTMINSTER STREET
PROVIDENCE, RI 02903
(401) 274-0300

ATTORNEYS FOR DEFENDANT

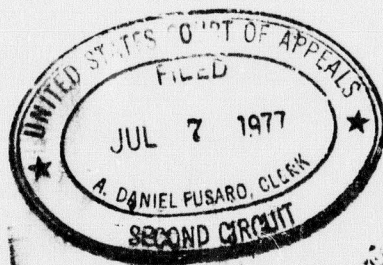


TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT IN REPLY:	
I. The prosecution's evidence bearing on the one specific act set out in the indictment was insufficient, as a matter of law, to convict this defendant of the specific crimes charged	1
II. The government's case is in collision with itself.....	15
III. This Connecticut track's change in policy after April 5, 1976 was relevant to the issue of "wilfulness.".....	18
IV. The government was guilty of "gross negligence" in failing to advise the defendant's counsel of this Connecticut track's later change to a "winner verification" procedure.....	23
V. The District Court failed in its duty to balance the probative force of Brochu's other-crimes testimony against its prejudicial effect, before admitting it into evidence..	27
VI. The District Court erred in allowing in Brochu's other-crimes testimony.....	30
Certificate of Service.....	33

TABLE OF CASES

	<u>Page</u>
Brady v. Maryland, 373 U.S. 83, 86-88 (1963).....	20,21,23,24, 25,26
Bozza, United States v., 365 F.2d 206, 213 (C.A. 2,1966).....	27,28
Crum, United States v., 529 F.2d 1380-1382 (9th Cir. 1976).....	4,5
Deutsch, United States v., 475 F.2d 55,57 (C.A. 5, 1973).....	23
Dumaine, United States v., 493 F.2d 1257 (C.A. 1, 1974).....	9,10,11,12,13, 18
Kessler, United States v., 449 F.2d 1315 (C.A. 2, 1971).....	12 12
Metcalf, United States v., 532 F.2d 752 (4th Cir. 1976).....	8
Pomponio, United States v., 97 S.Ct. 22 (1976)...	5
Rizzo, United States v., 313 F.Supp. 734, (D.Del. 1970), appeal dismissed, 439 F.2d 694 (3d Cir. 1971).....	11,12,13
Snyder, United States v., 549 F.2d 171-173 (10th Cir. 1977).....	7,8,9
Walsh, United States v., 544 F.2d 156 (4th Cir. 1976).....	5,6,9,12,13
Winship, In Re, 397 U.S. 358, 364 (1970).....	19
<u>Rules</u>	
Rule 403, Federal Rules of Evidence.....	30

ARGUMENT IN REPLY

I

The prosecution's evidence bearing on the one specific act set out in the indictment was insufficient, as a matter of law, to convict this defendant of the specific crimes charged.

The government-appellee's brief cites numerous "ten percenter" cases; the brief blandly suggests the instant case is essentially like those cited.

This case differs from those other so-called "ten percenter" cases, and in more than one important respect.

One important difference, however, is that this indictment, although in two counts, has to do with only one incident, that occurred on April 5, 1976; and there is no testimony from any participant in that one incident which is incriminatory of DiMaio. Other "ten percenter" cases cited and relied on by the government in its brief are cases of defendants convicted by evidence furnished by participants in the criminal acts alleged in such indictments.

There was no evidence implicating DiMaio furnished by any of the alleged participants in the one incident set

out in the instant two-count indictment. Those alleged participants were: Collins, DiMaio, and Kubesh.

Collins (who also used the name Smith) did not testify in the case. Why he wasn't called as a prosecution witness is known only to the prosecutor. Collins could have been called because, although originally named a co-defendant with DiMaio, Collins had pleaded guilty and his case was disposed of before DiMaio's case came to trial.

DiMaio did not testify. Nor were any admissions attributed to DiMaio by any witness.

Kubesh did testify, but he could not identify either of the two men who played a part in purchasing his winning ticket. (A. 36-44)

Even if the fullest effect be given the testimony of the one IRS Special Agent, Mr. Weber, who said he identified DiMaio as one of two men participating in the purchase of Kubesh's ticket, this is not enough to implicate DiMaio in a criminal violation under federal law, and certainly not enough to implicate him in the specific charges set out by the instant indictment. The District Court recognized that it is not a federal crime to buy, or sell, a winning racetrack ticket, on either a race yet to be run or on a race already completed. (Tr. 366)

None of the three IRS agents who did testify heard any part of any conversation between DiMaio and Collins, either before or after the latter cashed the ticket handed him by DiMaio.

The crucial elements missing in the record of this case are: evidence of the relationship between, or of what went on between, the defendant DiMaio and Collins before Collins received and cashed the one specific ticket in question, and evidence of "wilful" participation by DiMaio in the alleged subsequent furnishing of false information by Collins alone, on Form 1099, incident to his subsequent cashing of the one specific ticket mentioned in both indictment counts.

In defendant-appellant's original brief (pp. 15-17), three factual possibilities are set out consistent with the unclarified, and anemic, record in this case, and also with DiMaio's innocence. The government's brief in reply carefully avoids discussing any of these three possibilities --while blandly reassuring itself and the court that the prosecution's evidence was "overwhelming."

Most of the so-called "ten percenter" cases cited in Part I of the government-appellee's brief have already been analyzed in the defendant-appellant's original brief.

Some of these "ten percenter" cases were not, however, so analyzed; but are hereinafter discussed.

One case relied on by the government (appellee's brief, page 14) is United States v. Crum, 529 F.2d 1380 (9th Cir. 1976). Crum was indicted for "aiding" and "assisting" others in the preparation of false income tax returns; he played an active part in a scheme to assist high-income taxpayers in falsifying their income tax returns. As a breeder and seller of beavers, he "backdated" two contracts so that high-income taxpayers who had dealt with him (principally physicians) would be in a position to argue for inflated depreciation deductions on their individual income tax returns (529 F.2d at Page 1382). Through such "backdated" contracts these taxpayers were "aided" and "assisted" in claiming clearly inflated depreciation deductions (that is, false deductions) for prior income tax periods. There was, thus, no question about "willfulness" being present in the case of Mr. Crum. There is no question that Crum knew his "backdating" constituted a misrepresentation that was designed to reduce the amount of income taxes his customers would be required to pay the IRS.

In the case of DiMaio, there is no evidence that he knew what he did constituted a misrepresentation of any

degree, or was in violation of some federal statutory requirement of truthfulness imposed on him and on others similarly situated. The government's evidence, giving it its fullest possible effect, showed that DiMaio bought a winning race-track ticket, or participated in its purchase, from a man named Kubesh. There is nothing legally wrong with buying a winning racetrack ticket. There is no express - or implied - representation or misrepresentation of fact involved in such a purchase. No federal statute defines such conduct to be a crime. The distinction between the Crum and the instant case is to be found in the definition of "willfulness" set out in the recent Supreme Court case of United States v. Pomponio, 97 S.Ct. 22 (1976), which that opinion indicates is generally applicable to federal tax crimes. Crum plainly knew he was violating a duty of truthfulness when he "backdated", for the benefit of his customers, contracts to the prejudice of the federal treasury. There is no evidence that DiMaio knew what he did constituted a misrepresentation of any degree, or was legally wrong, that is, violated a "known legal duty" imposed on him by federal law. Cf. United States v. Pomponio, supra.

Another case relied on by the government (appellee's brief, page 17) is United States v. Walsh, 544 F.2d 156 (4th

Cir. 1976). That case is clearly distinguishable. There was a clear "notice" given by that track (Bowie Racetrack) to its patrons that names of "winners" were sought for the purposes of Form 1099. The following appears as Footnote 6, 544 F.2d at Page 160:

"The Bowie program of February 24, 1975, carried a notice reading as follows:

'Before receiving payment of \$600 or more for a \$2 wager, or \$900 or more for a \$3 wager, a person presenting a winning ticket (payee) must provide proper identification. The required identification must be the name, address, Social Security number of the actual winner, that is the person owning the winning ticket. The identity of the actual winner is furnished to the Internal Revenue Service for determination of income tax liability. It is a violation of federal law to furnish false information or to assist another in furnishing false information.

District Director, Internal Revenue Service'"

(Underscoring supplied.)

The difference between Walsh and the instant case is this: in Walsh the patrons of Bowie Racetrack, including the defendants in that case, were put on actual notice (a similar or equivalent "notice" was not adopted by the Connecticut track until July, 1976, several months after the relevant date mentioned in this DiMaio indictment) that this Bowie

track was interested in supplying the IRS with the name of the "winner" of a ticket.

Another case relied on by the government (appellee's brief, page 16) is United States v. Snyder, 549 F.2d 171 (10th Cir. 1977). Snyder is the classic case of a "ten percenter", that is, of someone with no ownership interest in the ticket he is cashing for another in return for a ten percent commission. Clearly, as the Tenth Circuit recognizes, Snyder was not the "payee" of the amount shown on the Form 1099; he was only an "agent" acting for an undisclosed principal, viz. the original bettor-winner who retained his ownership interest in the ticket although he handed it to Snyder for cashing. When he, Snyder, represented himself as the "payee" or "winner" of the amount shown on the Form 1099, he misrepresented because he was neither the "true payee" of the amount shown on the Form 1099 (the undisclosed principal was the "true payee") nor the "owner" of the ticket being cashed.

In the instant case, DiMaio and/or Collins, unlike Snyder, were not "agents" for any undisclosed principal. The evidence establishes that they "bought" the ticket from Kubesh, the original winner-bettor.¹ Therefore, unlike

¹See A-39 to A-44, Appendix for the Defendant-Appellant.

Snyder, DiMaio and/or Collins weren't "agents" acting for an undisclosed principal when DiMaio and/or Collins cashed the ticket in question. DiMaio and/or Collins were acting for themselves in cashing the ticket so purchased. In short, DiMaio and/or Collins were at the moment of cashing "true owners" and "payees" of the amount in question. Collins (and a fortiori DiMaio) made no misrepresentation in simply failing to identify the original bettor-winner, Kubesh, whose identity was not even sought by the track form then in use at this newly opened Connecticut track.

Moreover, there is reason to believe (although the Snyder opinion does not expressly so acknowledge) that there was a "winner verification" or "winner identification" procedure in place at the Colorado track involved in the Snyder case. The opinion (549 F.2d at Page 173) indicates that the Snyder case "is almost on all fours" with United States v. Metcalf, 532 F.2d 752 (4th Cir. 1976). The full Metcalf opinion is not reported at 532 F.2d 752; it is, however, reported in full by Commerce Clearing House (76-1 U.S.T.C. Par. 9192) and by Prentice-Hall (37 AFTR 2d 76-783). The full Metcalf opinion, rendered in 1976, shows that the track there involved was Bowie Race Course in Maryland. The

Walsh case (cited and discussed earlier) shows that, as early as 1975, Bowie had the equivalent of a "winner verification" or "winner identification" procedure in place, because there was a "notice" printed in the track program, signed by the District Director of Internal Revenue, indicating that the identity of ticket "winners" was sought by that track on the relevant date. See Page 6 of this reply brief.

Another case relied on by the government (appellee's brief, pp. 14, 17) is United States v. Dumaine, 493 F.2d 1257 (C.A. 1, 1974). This Dumaine case, like the Snyder case previously discussed, presents the classic case of clear evidence of the owner of a winning ticket hiring an "agent", a "ten percenter", to misrepresent himself ("the ten percenter") as the "payee" of the amount in question. Where, as in Snyder and Dumaine, the evidence in a case shows clearly that someone has hired an "agent" to misrepresent himself as "payee" of an amount of money in which he has no ownership interest, and such "agent" thereafter represents himself to the track, or the IRS, as the "owner" or "payee" of the amount in question, both parties are guilty of falsifying Form 1099. The undisclosed principal (Dumaine) in hiring such an "agent" therefore clearly "aided" and "abetted" in the filing of a false

Form 1099.

In the instant case, unlike Dumaine, there is no evidence of what went on between DiMaio and Collins before the ticket in question was cashed by Collins alone. If Collins owned the ticket in question in whole or in part (having furnished all or part of the consideration for its purchase earlier to DiMaio, or having been in partnership with DiMaio) DiMaio would not be a participant in "aiding" and "abetting" in the preparation of a false Form 1099 unless the evidence demonstrated he knew or intended that Collins was going to make some misrepresentation to the track cashier or to the IRS. The evidence in this case (unlike the evidence in the Dumaine case) shows no such knowledge or intention on the part of DiMaio.

Moreover, in Dumaine that track put its patrons, including the defendant Dumaine, on "notice" that the IRS wanted the names of actual "winners." Paragraph 3 of the syllabus of this Dumaine case reads (493 F.2d 1257):

"Contents of notice posted at dog track
informing patrons of requirement that Internal
Revenue Service be informed of all persons
winning \$600 or more did not affect statutory
requirements and were relevant only to the
question of wilfulness of violation of law
prohibiting the procurement of another to aid
in the preparation of a fraudulent IRS form."
(Emphasis supplied)

In the body of its opinion, the Court of Appeals in

Dumaine acknowledged the relevance of such "notice" to the issue of "willfulness." The First Circuit stated, 493 F.2d 1259:

"Whether or not patrons received actual notice of the requirement for name and address of actual recipients is relevant only to the question of willfulness, United States v. Rizzo, supra."²

In the instant case, unlike Dumaine, there was no "notice" given by this Connecticut track to its patrons (before July of 1976) that it wanted the names of ticket "winners".

The government-appellee's brief (pp. 13,14) strips from its clarifying context and distorts the meaning of the following excerpt (493 F.2d 1259) from this Dumaine opinion:

"The teller was under no obligation to ask for the name and address of the actual recipient of the income. It was reasonable for him to assume that, unless notified otherwise, the person presenting the ticket would be the actual recipient of the income."

Of course it was "reasonable" for the teller in that case (Dumaine) to make such an assumption because that track (unlike this Connecticut track) had previously put its patrons on actual "notice" that it sought the names of ticket "winners". See page 10 of this reply brief. All this excerpt means is

²DiMaio's alleged "willfulness" is of course what the instant case is all about.

that tellers at the Dumaine track didn't have to tell track patrons a second time what that track had already once told them.

Another case relied on by the government (appellee's brief, page 17) is United States v. Rizzo, 313 F.Supp. 734, (D.Del. 1970), appeal dismissed, 439 F.2d 694 (3d Cir. 1971). This Rizzo case is clearly distinguishable; it is similar to the Dumaine and Walsh cases, previously discussed in this reply brief, because that track informed its patrons "by posters and programs that it was required to send to the Internal Revenue the names of the actual winners of over \$600...." 313 F. Supp. 734, 735.

The instant case is thus unique--in comparison with all other previously decided so-called "ten percenter" cases--in that (before July, 1976) this newly opened Connecticut track furnished no "notice" whatsoever to its patrons that the names of original ticket "winners" were sought for the purposes of Form 1099. That "notice" in such other cases took different forms. In some cases, reviewed by the Second Circuit, the "notice" took the form of a required "winner verification" slip. Cf. United States v. Kessler, 449 F.2d 1315 (C.A. 2, 1971), discussed along with other similar cases at pages 20, 21 and 22 of the original BRIEF FOR THE DEFENDANT-APPELLANT. In yet

another case the "notice" took the form of a message to track patrons from the local District Director of Internal Revenue, printed in the track's program. Cf. United States v. Walsh, supra, discussed at pages 5 and 6 of this reply brief. In Dumaine and Rizzo the "notice" took the form of a "posted notice". Cf. United States v. Dumaine, supra, and United States v. Rizzo, supra, discussed at pp. 9 to 12 of this reply brief.

The government's brief (page 17) does score a minor point by describing defendant's argument (too narrowly expressed in his original brief) as follows:

"The defendant argues that one is not properly the subject of a violation of Section 7206(2) unless and until a 'winner verification' form is signed at the track and the track relies on the winner verification form to complete its Form 1099. The law is clearly to the contrary."

The cases then cited by the government at this point (previously discussed in this reply brief) do indicate that at some tracks there was in use an alternative form of "notice" furnished to track patrons that, however, had the equivalent effect of a "winner verification" form in alerting patrons to the need for names of "winners" in filling out Form 1099.

In the instant case, as of the relevant date in the indictment, this newly opened Connecticut track had neither a "winner verification" form nor equivalent "notice" to its patrons that the names of "winners" were required for Form 1099. Clearly such a "notice" is all important because in the absence of such a "notice" the confusing and ambiguous official instructions for filling out Form 1099 would put no one on notice that only the names of ticket "winners" should appear on Form 1099. See pages 25 and 26 of defendant-appellant's original brief. No prior court has had to consider these ambiguous and confusing official instructions because the supplementing "notice" apparently in use at other tracks rendered academic any reference to them; besides, they were apparently not introduced into evidence in any other reported "ten percenter" case.

II

The government's case is in collision with itself.

The case against Di Maio consisted primarily of (a) testimony from three IRS Special Agents as to their close observation of Di Maio on the evening of April 5, 1976; and (b) testimony from one Brochu implicating Di Maio in alleged prior and subsequent similar acts.

In his original brief (pp. 42 - 44) defendant-appellant has set out seven reasons for concluding that Brochu (a last minute addition to the government's list of witnesses) committed bold-faced, self-serving perjury.

Presumably, the government now argues, however, that for purposes of this appeal this Court must accept the agents' testimony and Brochu's testimony as both being true. But the government's case must yield on one of these two fronts.

The thrust of the three agents' testimony was that they had Di Maio under close surveillance on the night of April 5, 1976, so close they could even identify the size of a small race-track ticket that he held in his hand (although all three struck out as to its color). Government witness Brochu testified that on that same evening of April 5, 1976, Di Maio dealt with him, Brochu, on two occasions, arranging for Brochu to cash two winning tickets owned by Di Maio, with Brochu allegedly representing himself to the track as the "payee" of such tickets but allegedly

thereafter turning over such proceeds to Di Maio. Yet none of the three IRS agents who had Di Maio under close surveillance that evening saw Brochu in Di Maio's company.

Indeed, the government's brief makes this conflict in its own case even more striking by reading Brochu as testifying to three (3) ticket-cashing transactions on behalf of Di Maio on this night of April 5, 1976, all three of which the IRS agents having Di Maio under close surveillance presumably failed to notice. See page 9 of brief for the Appellee.

The government on this appeal cannot have it both ways. Either these three IRS agents were a trio of sadly myopic hawkshaws (with devastating consequences to the government's case) or, what is more likely, Brochu committed bold-faced perjury (with equally devastating consequences to the government's case).

The government's case is again self-contradictory in another important respect.

Although there was no testimony from either Collins or Di Maio, the government says (appellee's brief, page 13) that defendant Di Maio was part of an "elaborate" effort with Collins to deceive the track and the IRS. The government argues (brief, page 13):

"Elaborate steps were taken, including the use of fraudulent identification by Collins when cashing the winning ticket for the defendants, to ensure (sic) that no one would ever know the identity of the true winner."

This gratuitous assumption, unsupported by any evidence, implicating Di Maio in the use of alleged fraudulent identification is to be compared with Brochu's testimony, offered in as government evidence under the rubric of being prior and subsequent

similar" acts. According to the government and Brochu, Di Maio told Brochu to use his correct name (Brochu) in cashing tickets for Di Maio. (A-59, A-60; Tr. 190, 191, 277, 280, 305, 309-311)

Now why would Di Maio engage in "elaborate steps" to have one ticket-casher (Collins) use a false identification while simultaneously prompting another ticket-casher (Brochu), allegedly working for Di Maio at the same time, to use his correct name?

The logic behind Brochu's perjury required him to so testify, viz, that Di Maio instructed him to use his (Brochu's) own correct name. Brochu was concerned that he be relieved by the Internal Revenue Service of liability for some \$28,000 of racetrack winnings on twelve (12) tickets that he had cashed, signing his own name only as "payee". (Exhibit 4; tr. 277, 309-311) To relieve himself, and to saddle Di Maio with income tax responsibility for the substantial amounts covered by these twelve tickets (Exhibit 4)--which on their face reflect Brochu's name only as the "payee"--Brochu had to testify he was instructed by Di Maio to use his correct name (Brochu) in cashing such tickets.

III

This Connecticut track's change
in policy after April 5, 1976
was relevant to the issue
of "wilfulness."

The government's brief suggests (pp. 19 - 21) that this Connecticut track's change to a "winner verification" policy in July, 1976, is irrelevant.

Whether this Connecticut track furnished actual "notice" to its patrons, as of April 5, 1976, that it wanted the names of ticket "winners" for Form 1099, is relevant to the issue of "wilfulness." In United States v. Dumaine, 493 F.2d 1257 (C.A.1, 1974) the First Circuit stated (at page 1274):

"Whether or not patrons received actual notice of the requirement for name and address of actual recipients is relevant only to the question of 'wilfulness'."

In Dumaine there was actual notice furnished by "posters" erected by the track. See page 10 of this reply brief. In the instant case there was no actual "notice" furnished by this Connecticut track, before July of 1976, that it sought the names of "winners" for Form 1099.

In the absence of such actual notice furnished by a track, all that any track patron might have to enlighten him as to his "legal duty" would be the official instructions (A-115 to A-117) for filling out Form 1099. Such instructions do not indicate that only the name of the ticket "winner", or "actual income recipient",

should appear on Form 1099. See the analysis of such official instructions at pages 25, 26 of defendant-appellant's original brief.

No court reviewing a so-called "ten percenter" case has previously had to consider such official instructions because the tracks in such other cases had furnished some supervening form of actual "notice" to their patrons, that what was wanted were the names of "winners", and so there was no need in those cases to consider these official instructions (which, in any event, were apparently not offered in evidence in any prior case).

The government's brief in this case (pp. 13 - 15) seems to argue, or assume, that it is irrelevant whether a track has furnished actual "notice" to its patrons: in other words, the average track patron in any event should be charged with knowledge that the names of "winners" or "actual income recipients" should appear on Form 1099. There are at least two difficulties with this argument. First, since this is a criminal case the prosecution bore the burden of proving every fact essential to a finding of guilt In Re Winship, 397 U.S. 358, 364 (1970). Secondly, to assume that the average track patron must know that only the names of "winners" or "actual income recipients" should appear on Form 1099, is to assume that the average track patron, including Di Maio, knew what the Commissioner of Internal Revenue himself does not know. The Commissioner's official instructions for Form 1099 do not indicate that only the names of ticket

"winners", or "actual income recipients" may properly appear on Form 1099. (A-115 to A-117). See the discussion at pp. 25, 26 of defendant's original brief.

The government's brief (page 15) also argues that this Connecticut track's home-made Form 1099 is "nearly identical" with the official Form 1099. There is a crucial difference. The official Form 1099 advises all, on its face, that "COPY A" is "For Internal Revenue Service Center". The official instructions for filling out Form 1099 advises payers that if they decide to substitute another form for official Form 1099, they should reflect the following equivalent message on the substitute form (A-115; see 'F. Statements to Recipients'):

"This information is being furnished on Forms 1099 (or 1087) to the Internal Revenue Service."

This Connecticut track's substitute home-made Form 1099 does not contain the Commissioner's required message. (A-114) A track patron might thus conclude, before July of 1976, that this home-made Form 1099 was merely a "receipt" to the track by a person receiving money from the track. (A-114) Indeed, that is apparently how track cashier Walsh viewed this home-made form, as of April 5, 1976. (A-27 to A-29; Tr. 53-55)

If the government before trial had furnished defendant's counsel, pursuant to his pre-trial request for all Brady material, with information that this Connecticut track did not give "notice" to its patrons, until July 1976, that it wanted the names of ticket "winners" for Form 1099, the defendant's counsel could have confidently argued to the jury that Di Maio had no "notice", as of April 5, 1976, of any obligation to furnish this new

Connecticut track with the name of the original "winner", Kubesh and his friends, on the ticket later cashed by Collins. He could also have argued to the jury that purchasing a "winning" ticket after a race was run--even trafficking in the purchase and redemption of such winning tickets--was before July, 1976, not known by Di Maio and others to be legally wrong and called for no inquiry by Di Maio into the identity of the original ticket "winner." He could have argued forcibly to the jury that the track's home-made Form 1099 was, before July, 1976, a misleading form, that the July, 1976, change was designed to correct.

Such Brady information might even have assisted defendant's counsel in attempting to correct the District Court's persistent misreading and misapplication of several cases decided by the Second Circuit. (A-85, A-86; Tr. 344, 345) The District Court apparently failed to notice that the Second Circuit cases it referred to, in denying defendant's motion for acquittal, were all cases where a "winner verification" or "winner identification" procedure was in place that did put track patrons on actual notice that the names of ticket "winners" were sought by such tracks in filling out Form 1099. (A-85, A-86; Tr. 344, 345) These Second Circuit cases are analyzed in defendant-appellant's original brief, at pp. 20 - 25. If the government had before or during trial fully complied with the defendant's Brady request, the District Court, on learning that this Connecticut track did not have a "winner verification" or "winner identification" procedure in place before July, 1976 (the District Court never did learn this fact) might possibly have seen that it was misapplying these Second Circuit cases, where such procedures were in place at the time of the

relevant events in such cases.

The government's brief (pp. 20, 21) lifts from their contexts two isolated statements made in legal argument by defendants' counsel, to the effect that track policy and events after April 5, 1976, are not relevant. These argumentative statements were made early in the case (Tr. 26, 45) before the District Court had indicated it would allow the government to introduce into evidence, over defendant's objection, prior and subsequent allegedly similar acts testified to by Brochu (Tr. 176-182), and before Di Maio's counsel knew of the Connecticut track's later change, in July, 1976, to a "winner verification" policy. It is ironic that the government should now be arguing its right to present Brochu's evidence of subsequent acts, after April 5, 1976, while citing against defendant statements made earlier by his counsel in legal argument when defense counsel was trying to keep out all evidence subsequent to April 5, 1976.

IV

The government was guilty of "gross negligence" in failing to advise the defendant's counsel of this Connecticut track's later change to a "winner verification" procedure.

In considering the government's Brady obligation, the United States government is not to be viewed as limited to the Assistant U.S. Attorney assigned to prosecute this case. cf. United States v. Deutsch, 475 F.2d 55, 57 (C.A. 5, 1973). In Deutsch the government argued, as it does here (brief, pp. 18-23), that the Department of Justice attorney who tried the case did not know personally of the Brady material that the defense might have used to advantage. The Deutsch Court viewed the government's Brady obligation as extending beyond the Department of Justice attorney who tries a case; it includes also the agency (in that case, the Post Office) that actively participates in the prosecution.

In this case the Internal Revenue Service actively participated in this prosecution, based essentially as it was on a violation of the Internal Revenue Code. The government's brief does not attempt to argue that before this case was tried in January, 1977, the Internal Revenue Service was unaware of

this July, 1976, change in this Connecticut track's policy. Such an argument would be close to incredible. There is every reason to believe that the IRS was, directly or indirectly, responsible for this change in policy--or at the very least knew of this change before the instant case was tried. The government brief quickly glides off this point by representing (brief, page 21) that "the verification form was utilized after a suggestion from the Connecticut State Commission On Special Revenue, a decision in which the Internal Revenue Service took no part." This bland statement does not deny knowledge by the IRS of the change allegedly suggested originally by a state commission. Nor does it offer any satisfactory explanation why a state commission should be so concerned about the kind and quality of information being furnished only to the IRS for its strictly federal purposes. This court would be monumentally naive to infer that this change was a change in which the IRS played no part, or a change of which the IRS had no knowledge before this case came to trial.

The government also argues (brief, page 22) that since defendant's counsel became aware of this "verification" change after the instant trial--but didn't then move for a new trial--the government's disregard of its Brady obligation should

be overlooked. The purpose of Brady is to furnish a defendant with material for use at his trial--e.g. that might be used to influence the jury's verdict. The fact that the defendant didn't make a post-trial motion for a new trial cannot serve to palliate an already then matured violation of the government's Brady obligation.

Moreover, there was ample justification for not then filing a motion for a new trial on this limited basis. The period for filing a conventional new trial motion had already expired. The defendant's financial resources were already exhausted; his present appeal is as an indigent. To lay a basis for such a new trial, he would have had to order, pay for, and obtain promptly a transcript of the evidence in this Schettini case, to convince the District Court that adoption in July, 1976, of this new "winner verification" procedure had some factual foundation. In addition he would have had to pay his attorney to go ninety miles to New Haven to argue the new trial contention. There was, moreover, little reason in the opinion of DiMaio's counsel to think the District Court would be in any way moved by the new information; the District Court seemed to think (even in the absence of any proof of a "winner verification" procedure) that racetrack patrons might be chargeable

with knowledge that Form 1099 should reflect only the name of the original "winner" on a ticket. (A-96) (On the other hand, if it had been furnished at the trial, defense counsel could have used such Brady information in his argument to the jury; see part III of this reply brief.) Finally, a new trial based solely on the government's violation of its Brady obligation would furnish only partial relief of a most unsatisfactory nature to this defendant. Even if a new trial were granted, on that basis, the District Court could be expected on any new trial to permit Brochu's testimony to be repeated again, before another jury. Defendant and his counsel were interested in a review by this Court of Appeals of all the errors made in the trial proceedings below; they were not interested in getting a new trial based on solely considering and then correcting one error only, viz. the government's disregard of its Brady obligation.

V

The District Court failed in its duty to balance the probative force of Brochu's other-crimes testimony against its prejudicial effect, before admitting it into evidence.

A federal court presented with an offer of other-crimes testimony has both a problem and a duty. This Court of Appeals has analyzed both the problem and the duty in United States v. Bozza, 365 F.2d 206, 213 (C.A. 2, 1966) where it cited with approval the following from McCormick on Evidence:

"the problem is not merely one of pigeon-holing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility." (Emphasis supplied.)

The District Court here did not inquire into the "convincingness" of Brochu's other-crimes testimony, or into its "strength or weakness." It just accepted uncritically and unquestioningly the government attorney's very brief and highly partisan description of such testimony before coming to a decision favoring its admission. (A-14 to A-24; A-45 to A-60;

Tr. 3 to Tr. 12; Tr. 176 to 191)

Had the District Court inquired into the "convincingness" of such other-crimes testimony--and into its "strength or weakness"--before admitting it, the District Court would have noted its fragility as explained in defendant-appellant's original brief (pp. 41-44).

It is significant that the government's brief wholly fails to discuss (or even to cite) the Bozza case, and also wholly fails to deal with the seven later emerging vulnerabilities in Brochu's testimony as set out in defendant-appellant's original brief (pp. 41-44). Although the government's brief concludes that the District Court did "balance" the probative force of Brochu's testimony against its prejudicial effect, before admitting it into evidence, it does not cite any pages of the record in support of that conclusion.

How could the District Court have weighed and balanced the "probative force" of evidence it had not yet heard -- evidence that was described to it in only the most general and partisan terms by a prosecutor plainly not interested in volunteering information likely to diminish its acceptability? To argue that the District Court did properly "balance" the relevant factors in such evidence is to argue that the District

Court did something legally impossible. The District Court could not have "weighed" or "balanced" evidence it was ignorant of at the time it made its ruling admitting it into evidence.

There was a heavy duty on the District Court to weigh and to balance carefully this other—crimes testimony before allowing it in evidence; and there is now an obligation on this court to review the record to determine how well the District Court discharged that duty. cf. United States v. Robinson, 544 F.2d 611 (C.A. 2, 1976); see particularly pp. 615, 616, and Footnote 6.

VI

The District Court erred in allowing in Brochu's other-crimes testimony.

Rule 403 of the Federal Rules of Evidence provides that even if evidence is "relevant" it ought to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Here the defendant DiMaio was brought into a federal court to be tried on a two-count indictment, both counts of which dealt essentially with a single incident that occurred on one evening, April 5, 1976. This single incident had to do with the cashing of one (1) very specifically identified racetrack ticket. (A-5, A-6) Then he is told at the last minute that the prosecution intends to offer in testimony concerning twelve (12) other racetrack tickets, six of which were cashed before the date of the one indictment incident mentioned, and six of which were cashed after the one indictment mentioned. (Exhibit 4). The person involved in these twelve (12) other cashings was a person (Brochu) not mentioned in either of the two counts of the indictment.

The jury in this case throughout the trial must have been thoroughly confused about what case it was trying. This confusion could only have been compounded by the peculiar practice in the Federal District Court of Connecticut of not reading the indictment to the jury at the outset of a federal criminal trial. Thus the evidence about the twelve (12) cashings by Brochu came into evidence, along with the evidence of the one (1) cashing mentioned in the indictment, without anyone telling the jury of any difference between them. Certainly these twelve (12) cashings must have dwarfed into insignificance in the jury's scale of values the one (1) cashing for which Brochu was on trial. Then at the very end of the trial the District Court told the jury in its charge about what was involved in this indictment, and attempted to explain that although Brochu's testimony about the twelve (12) cashings could be considered by them, the real issue was the one (1) cashing mentioned in the indictment (with which Brochu had no connection).

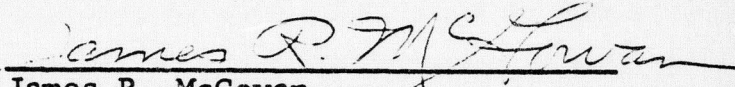
Counsel for DiMaio submit that it was impossible for the District Court, or for any judge, to explain properly to the jury and for the jury to apply the necessary limitations that at the last minute had to be placed on the use of Brochu's testimony by this jury. The District Court's very brief and

confusing reference in its charge to the effect that should or might be given to Brochu's testimony is set out in appellant's record appendix. (A-103 to A-105) The Court of Appeals should put itself in the position of a layman hearing this brief excerpt. Counsel for DiMaio submit that even an intelligent, attentive juror would be confused as to what the District Court so briefly told him about Brochu's testimony, and about how the jury might or could apply it properly.

The government's brief (page 26) cites cases indicating that prior "similar" acts are admissible to prove various issues in a criminal case, such as "knowledge and intent". But the District Court here did not confine this jury to using Brochu's testimony only for some such limited purpose. The District Court here allowed the jury to use Brochu's testimony as proving the substance of the factual allegations set out in this indictment. (A-103 to A-105) Indeed, even earlier when the government first offered this evidence, the remarks of the prosecutor and the remarks of the District Court indicate that Brochu's testimony was not going to be confined to proving the defendant's "knowledge and intent", but rather to prove the substantive facts of the one incident alleged in both counts of this indictment (with which Brochu had no connection).

These remarks of the prosecutor and of the District Court are set out at pages 38 to 40 of the defendant's original brief.

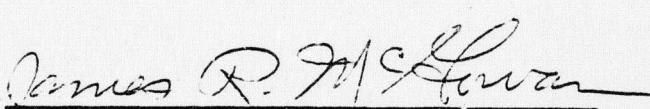
Respectfully submitted,


James R. McGowan
Counsel for the Defendant

Certificate of Service

I hereby certify that service of the within reply brief was made on the United States on July 5, 1977, by mailing a copy thereof to its counsel, postage prepaid, properly addressed to:

Michael Hartmere, Esq.
Asst. U.S. Attorney
270 Orange Street, Room 310
P.O. Box 1824
New Haven, Connecticut 06510


James R. McGowan